IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.12.2007

Coram:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

C.R.P.(NPD)No.1757 of 2003
and
C.M.P.No.18438 of 2003

M/s.Sundaram Motors,
(a Division of T.V.Sundaram Iyengar & Sons),
180, Anna Salai, Mylapore,
Chennai 600 006. .. Petitioner
(Ist degendant)

vs.

B.Lalitha .. Respondent
(Plaintiff)

PRAYER:Civil Revision Petition filed to set aside the order and decretal order in I.A.No.21928 of 2000 in O.S.No.3597 of 2000 passed by the XIV Assistant Judge, City Civil Court, Chennai on 11.09.2001 refusing to grant to the petitioner leave to defend the suit and grant unconditional leave to defend the suit.

For Petitioner : Mr.A.Devanathan
For Respondent : No Appearance

O R D E R

The Civil Revision Petitioner is the first defendant in O.S.No.3597 of 2000 on the file of the learned XIV Assistant Judge, City Civil Court, Chennai. The Civil Revision Petitioner herein has filed an I.A.No.21928 of 2000 before the trial Court as petitioner under Order 37, Rule 3(5) of C.P.C. and under Section 151 C.P.C. praying to permit him to defend the suit and filed a written statement in due course. The Respondent/Plaintiff filed a counter stating that the application is not maintainable in law and that the applicant/First Defendant has no triable issues to defend the suit as contemplated under Order XXXVII, Rule 5 C.P.C. and that the amounts were collected by the Applicant/First Defendant as Trustee and the amounts were handed over only to him for due performance and the drafts were taken according to the instructions given by the applicant at the time of booking and that the applicant acted on behalf of the second defendant as booking agent and hence, both are jointly and severally liable for due repayment and prayed for dismissal of the said application.

2.The learned XIV Assistant Judge, City Civil Court, Chennai has passed order in I.A.No.21928 of 2000 on 11.09.2001 observing that the Applicant/first Defendant has no triable issues and that the applicant is not eligible to seek unconditional leave to defend the

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suit and dismissed the said application with costs.

3.The learned counsel for the Revision Petitioner/first Defendant/Applicant contends that the order passed in I.A.No.21928 of 2000 dated 11.09.2001 is erroneous in law and that the Court below failed to see that the suit for refund of car booking advance paid by the Respondent/Plaintiff directly to the second defendant is not maintainable as against the Civil Revision Petitioner/first Defendant/Applicant and that no cause of action arose for the Respondent/Plaintiff as against the Revision Petitioner/First Defendant/Applicant since no amount is due from the Revision Petitioner/first Defendant/Applicant to the Respondent/Plaintiff.

4.It is the further case of the Revision Petitioner/first Defendant/Applicant that at the time of car booking advance contract (not produced by the respondent/Plaintiff) between the Respondent/Plaintiff and the second defendant clearly mentioned for refund of car booking advance by the second defendant alone in case of cancellation and not by the Revision Petitioner/first Defendant and this fact was not properly appreciated by the Court below and that the Revision Petitioner/first Defendant/Applicant was nowhere in the picture and whether the suit is maintainable against the Revision Petitioner/first Defendant/Applicant raises a triable issue and the Revision Petitioner/first Defendant/Applicant has a genuine and valid defence and in this background, the Court below ought to have granted leave to the Civil Revision Petitioner/first Defendant and therefore, the order passed by the Court below in I.A.No.21928 of 2000 dated 11.09.2001 is liable to be set aside.

5.The learned counsel for the Revision Petitioner relied on the decision 1998 (II) CTC 382, SUNIL ENTERPRISES AND ANOTHER V. SBI COMMERCIALL AND INTERNATIONAL BANK LTD., wherein it is observed as follows:-

> "Code of Civil Procedure 1908, Order 37, Rule 3(5) - Summary suit - Leave to defend- Suit filed based on Bills of Exchange which were accepted by Appellants - Summary suit filed by Bank - Bank paid out large amounts of Bills of Exchange accepted by party who has already defaulted - Some of the Bills of Exchange were mere secondary documents - Defence raised by Appellants is not moonshine or illusory - Appellants have Prima Facie Case - Unconditional leave granted to defendant to defend suit."

6.The learned counsel for the petitioner cited the decision 2001 (4) CTC 178 between N.PRABAKARAN AND MANAGER CITIBANK N.A., 766, ANNA SALAI, CHENNAI-600 002, wherein it is held as follows:-

> "Code of Civil Procedure, 1908, Order 37, Rule 4- Grant of leave to defend in summary suit - Principles governing such leave - Defendant in summary suit for recovery of money filed petition pleading discharge of total loan amount and relied on 2 letters to prove discharge - Defendant who seeks leave to defend is not bound to prove his case at time of

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consideration of grant of leave – Court should find whether defendant has raised triable issues and whether defence is not sham or illusory – If defendant is able to demonstrate that liability was discharged and documents relied on by plaintiff was found to be forged after trial suit is bound to be dismissed – Triable issue is one which is proved at time of trial would result in dismissal of suit and leave to defendant has to be granted – Order of trial court granting conditional leave on payment of Rs.2 lakhs set aside and unconditional leave is granted."

7.The learned counsel for the revision petitioner pressed into service the decision 2006(3) CTC 583 at page No.584 between LIFE INSURANCE CORPORATION OF INDIA AND ANOTHER AND SMT.S.SINDHU, wherein it is observed that,

'Courts and Tribunals cannot re-write contracts and direct payment of money contrary to terms of contract.'

8.On the side of the Revision petitioner, the decision 2003(II) CPJ 176(NC) between T.V.SUNDARAM IYENGAR & SONS LTD. AND DR.MUTHUSWAMY DURAISWAMY & ANOTHER, is relied on and the same runs as follows:-

"Consumer Protection Act, 1986 – Section 21(b) – Motor Vehicles – Refund – Liability of dealer – Failure to deliver vehicle -Refund of booking amount claimed - Complaint against manufacturer dismissed by Forum – Hence appeal - State Commission held, manufacturer and dealer jointly and severally liable to refund deposited amount - Hence Revision - Consumer Forum has no jurisdiction to strike down a condition in contract - Specific terms of contract, manufacturer liable to refund the money with interest - Dealer not liable for non-refund the money with interest-Dealer not liable for non-refund of amount by manufacturer, not jointly and severally liable - Order set aside - Manufacturer committed breach of agreement, liable to refund the amount with interest - Cost awarded."

9.In 2003 All India High Court Cases 1542, RAJABHAU MAHADEORAO RAHATE V. DINKAR SHANTARAM INGOLE, on the interpretation of Section 115 Civil Procedure Code as amended in 1999, it was held as follows:-

"(i)The provisions of Section 115 as amended with effect from 1st July, 2002 are applicable from that date to all proceedings pending in High Court under Section 115 of the Civil P.C.

(ii) There is no right in a litigant to move an application under Section 115 of the Civil P.C. for exercise of the jurisdiction mentioned therein.

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(iii) That it being not a right, there is no question of it being saved by recourse to provisions of Section 6 of

the General Clauses Act, 1897.

(iv)The provisions of Section 32(2)(i) of the Amendment Act of 1999 do not either by direct legislation or by necessary implication save any such proceedings from being affected by the Amendment with effect from 01.07.2002.

(v)As a consequence of the above, all revision application, whether pending as on 1st July 2002 or filed thereafter, will have to be dealt with strictly in accordance with the provisions of Section 115 of the Civil P.C. With effect from 1st July, 2002.

vi) As a further consequence thereof, no revision application against an interlocutory order will be entertainable even if the order is made prior to 1st July, 2002 as moving High Court under Section 115 is held not to be a right."

10. In AIR 2004 DELHI 219, V.S.SAINI AND ANOTHER V. D.C.M. LTD., it is observed as follows:-

"(A) Civil P.C. (5 of 1908), O.37, R.3(6) S.96 - Summary suit - Refusal to grant leave - Order whether appealable - R.3(6) specifically stipulates that if leave to defend suit is refused plaintiff shall be entitled to judgment - Thus interlocutory order refusing leave to defend partakes form of judgment, thereby making it vulnerable to assault only through substantive and regular appeal - Thus defendant can avail second opportunity to present its defence by filing an appeal."

11.In (2003) 6 SCC 659, SHIV SAKTHI CO-OP. HOUSING SOCIETY, NAGPUR V. SWARAJ DEVELOPERS, it is held that 'the amendments are procedural in character and are therefore to be applied to all proceedings that have to be decided'. To put it differently, the amendments have retrospective applicability in the considered opinion of this Court.

12.In view of the amendments made to Section 115 of the Civil Procedure Code, a revision can no longer be filed on the basis that the order, if allowed to stand, would result in failure of justice or cause irreparable injury.

13.In that view of the matter, without going into the merits of the case, this Court comes to the conclusion that the revision is not per-se maintainable and this Court opines that the interlocutory order refusing leave to defend partakes the form of judgment and only a regular and substantive appeal can be filed against the said interlocutory order dated 11.09.2001, if so aggrieved and that the Civil Revision Petitioner/First Defendant/Applicant will have to pay necessary Court fee in appeal and in that view of the matter, the Civil Revision Petition is dismissed. In the circumstances of the case, the parties are directed to bear their own costs. The connected

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miscellaneous petition is closed.
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Sd/
Asst. Registrar

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Sub Asst.Registrar

To
1.The XIV Assistant Judge,
City Civil Court,Chennai.
2.The Registrar, City Civil Court, Chennai.
3.The Section officer, VR Section, High Court, Chennai.
+ 2 ccs to Mr. T.R. Sundaram, Advocate SR 72308
+ One cc to Mr. T. Francis Ashok, Advocate SR 72337
BK (co)
sg 03/01/08

Order in
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